A **MASTER BRISBANE ITANG**

v.

ROBINSON LEE & ORS

B HIGH COURT SABAH & SARAWAK, KUCHING
LINTON ALBERT J
[ORIGINATING SUMMONS NO: KG 24-457-2009-I]
15 MARCH 2010

C ***CIVIL PROCEDURE:*** *Transfer of proceedings - Application for - Transfer from Sessions Court to High Court - Plaintiff's claim beyond RM250,000 limit of civil jurisdiction of Sessions Court - Subordinate Courts Act 1948, s. 66(2) - Whether applicable - Whether application allowed*

D This was an application by the plaintiff for the transfer of the action commenced by the plaintiff in the Sessions Court ('the action') to the High Court although the trial of the action at the Sessions Court had commenced. The plaintiff's claim was beyond the RM250,000 limit of the civil jurisdiction of the Sessions Court E under s. 65(1)(b) of the Subordinate Courts Act 1948. The plaintiff relied on para. 12 of the Schedule to the Courts of Judicature Act 1964.

Held (allowing the application):

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(1) There was no conceivable reason why the procedure set out in s. 66(2) of the Subordinate Courts Act 1948 concerning counterclaims which involves matters beyond jurisdiction of the Sessions Court could not be applied to a case where, as here, G the claim involved an amount in excess of its jurisdiction. In the circumstances, the application was allowed. It was further ordered that the action be registered in the cause book of the High Court and proceeded with as if the action was instituted in the High Court pursuant to s. 66(2) of the Subordinate H Courts Act 1948. (paras 11 & 12)

Case(s) referred to:

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(dist)***

Riviera Bay Resort & Condo Management Sdn Bhd v. Sri Rimba Mentari Development Sdn Bhd [2003] 8 CLJ 720 HC ***(refd)***

I *Time Online Dotcom Bhd v. Bates (Malaysia) Sdn Bhd [2005] 6 CLJ 389 HC* ***(refd)***

Legislation referred to:
Subordinate Courts Act 1948, ss. 65(1)(b), (3), 66(2)

For the plaintiff - Shankar Ram; M/s Thomas Shankar Ram & Co Advocates
For the 1st, 2nd, 3rd, 4th & 6th defendants - Mohd Taufik Mohd Yusoff SFC; Federal AG's Chambers
For the 5th defendant - Joseph Chioh, State Legal Officer; State AG's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] This is an application by the plaintiff for the transfer of the action commenced by the plaintiff in the Sessions Court in Summons No. 53-66-2008-III (the action) to the High Court although the trial of the action at the Sessions Court had commenced. It is common ground that the plaintiff's claim is beyond the RM250,000 limit of the civil jurisdiction of the Sessions Court under s. 65(1)(b) of the Subordinate Courts Act 1948 and the parties have failed to agree to invoke s. 65(3) of the Act which states:

> When the parties to an action or suit which, if the amount in dispute or value of the subject matter thereof did not exceed the limit of the jurisdiction, would be cognizable by a Sessions Court, have entered into an agreement in writing that the Sessions Court shall have jurisdiction to try the action or suit, the Sessions Court shall have jurisdiction to try the same, although the amount of the subject matter thereof may exceed the value limit of jurisdiction.

[2] The undisputed facts are sufficient to determine the application without having to descend into dwelling on the charges and counter-charges made by the parties on the circumstances which led to this application. It is thus a simple application uncomplicated by the complexities of the charges and counter-charges.

[3] The plaintiff relies on para. 12 of the schedule to the Courts of Judicature Act 1964 which is as follows:

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12. Transfer of Proceedings

Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:

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Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

[4] In *Riviera Bay Resort & Condo Management Sdn Bhd v. Sri Rimba Mentari Development Sdn Bhd* [2003] 8 CLJ 720, an authority cited by learned counsel for the plaintiff, the facts relevant to the determination of these applications are set out in the headnote. They are as follows:

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The applicant then applied to the Chief Judge of Malaya for leave to transfer the magistrate's court summons to the sessions court, and thereafter, filed an application to the sessions court for an order to transfer same to the sessions court and for the said summons to be consolidated and heard together with the sessions court summons ... , the Chief Judge of Malaya issued a direction that the applicant apply to the High Court to transfer the magistrate's court summons to the sessions court, which the applicant did.

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[5] In allowing the application Low Hop Bing, J (as he then was) had this to say at p. 725:

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As the applicant before me has indeed applied to the learned Chief Judge for an order of transfer, and has been directed to apply to this High Court, the learned Chief Judge must have contemplated that this court has the jurisdiction which is unlimited: *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58, as referred to in *Malacca Securities*, *supra*.

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In my view, the jurisdiction of the High Court in making an order of transfer and consolidation of proceedings in subordinate courts has been expressly provided for in para 12, particularly the words "**Power to transfer any proceedings** ... to or from any subordinate courts, and in the case of transfer to or from a subordinate court to give any **directions as to the further conduct thereof** (emphasis added).

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[6] It is also not unknown for the High Court to order transfer of an action from the Sessions Court to the High court. A case in point is Originating Summons No. 24-190-2002-I where Richard Malanjum, J (as he then was) made such an order.

[7] The defendants on the other hand, rely on *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22, a case concerning the application for the transfer of a suit from the High Court in Malaya at Melaka to the High Court in Malaya at Kuala Lumpur. The application was dismissed and Augustine Paul J (as he then was) had this to say at pp. 36-37:

> It follows that in the absence of any rules having been made as required by the proviso to para. 12 the exercise of the power conferred by the paragraph would depend on whether the rules constitute a condition precedent to the exercise of such power ... As this power has been taken out from the enacting part of the paragraph it is not exercisable unless rules are made as stipulated in the proviso. The result is that the enacting part of the paragraph is only left with the power to order a transfer with no power to perform or carry out the order so made. An order made without power to enforce it will be ineffectual. This is particularly significant as the proviso is designed to regulate the procedure to be followed when an order is made for the transfer of a case from a High Court to another court of co-ordinate jurisdiction. It is therefore my view that the exercise of the power conferred by para. 12 depends on the existence of rules contemplated by its proviso as any order made without any rules to that effect would be ineffectual as it cannot be carried out. The language employed in the proviso also supports this conclusion. The use of the word 'shall' in the proviso gives it a mandatory effect.

[8] In refusing to follow the case of *Malacca Securities Sdn Bhd (supra)* Low Hop Bing J (as he then was) in the case of *Riviera Bay Resort And Condo Management Sdn Bhd (supra)* said at p. 725:

> It is necessary to observe that in so far as para 12 is concerned, the focus of the judgment was in respect of the transfer of proceedings from a High Court to another High Court of co-ordinate jurisdiction

[9] It stands to reason, therefore, that the reliance on *Malacca Securities Sdn Bhd (supra)* is misplaced because the instant application concerns transfer of an action from the Sessions Court to the High Court.

[10] There is, in substance, no difference between a claim and a counterclaim. In *Time Online Dotcom Bhd v. Bates (Malaysia) Sdn Bhd* [2005] 6 CLJ 389 Abdul Malik Ishak J (as he then was) had this to say in relation to a counterclaim at p. 393:

> It is a separate independent action and it may be made in respect of any matter, whenever and however arising ... In terms of quantum, the counterclaim may be more or less than the amount of the plaintiff's claim and it usually arise upon the issuance of the writ (*Wood v. Goodwin* [1884] WN 17). Procedurally, in a counterclaim the defendant would be treated as if he were a plaintiff ...

[11] There is therefore no conceivable reason why the procedure set out in s. 66(2) of the Subordinate Courts Act 1948 concerning counterclaims which involve matters beyond the jurisdiction of the Sessions Court cannot be applied to a case where, as here the claim involves an amount in excess of its jurisdiction. Section 66(2) states:

> (2) In any such case the High Court may, if it thinks fit, on the application of any party, order that the action or suit be transferred to the High Court, and the action or suit shall then be entered in the cause book or register of civil suits of the High Court, and proceeded with as if the action or suit had been originally instituted therein.

[12] In the circumstances the application is allowed in terms as prayed for in prayer 1 of the originating summons (encl. 2) and the respective parties to bear their own cost of this application. It is further ordered that the action be registered in the cause book of the High Court and proceeded with as if the action was instituted in the High Court pursuant to s. 66(2) of the Subordinate Courts Act 1948.

[13] Order accordingly.